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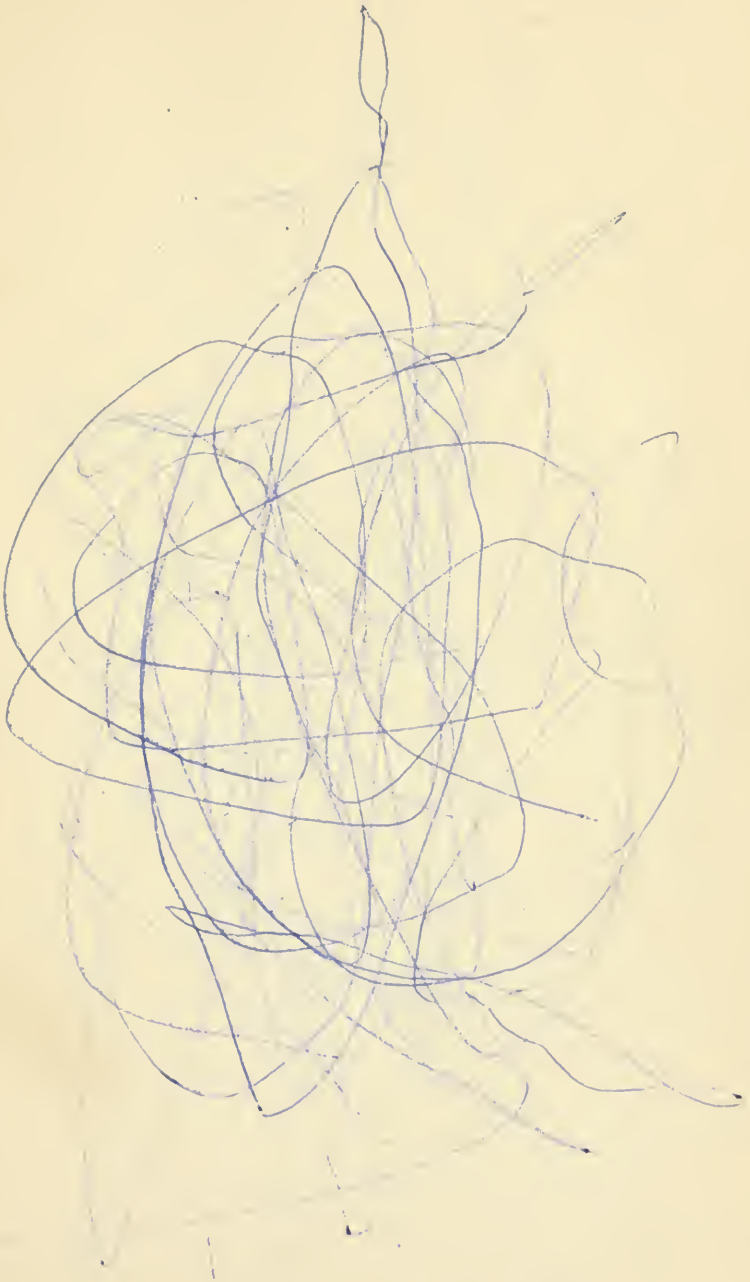
THEORIES & CRITICISMS OF SIR HENRY MAINE

MORGAN O. EVANS



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SIR HENRY MAINE

BY

MORGAN O. EVANS

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(*Senior Studentship* C.L.E., TRIN. 1890, PLACED FIRST IN THE COMPETITIVE EXAMINATION IN JURISPRUDENCE AND ROMAN CIVIL LAW);
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PREFACE

THE works of Sir Henry Maine have to be studied for the Honours Examination of the Inns of Court and the Universities at home and in the Colonies, and also for the final Examination of those who have passed the Indian Civil Competitive Examination. Jurisprudence is also an optional subject for the last-mentioned Examination.

The questions asked on Maine are those which are the best calculated to test the candidate's knowledge of the criticisms and theories contained in his six works, "Ancient Law," "Early Law and Custom," "Early History of Institutions," "Village Communities," "International Law," and "Popular Government," and more especially of such theories as relate to matters of doubt and questions in dispute in the science of Jurisprudence. In these works there is a great deal of writing that is absolutely useless to the student for examination purposes, and page after page has to be waded through in the search for a criticism or a theory; and to discover any complete theory or criticism on any one question or theory, it is often necessary to search through not only each one of the books, but also many different chapters or lectures in each of those books. This necessitates a great waste of time and mental

energy on the part of the student, there being over two thousand pages in all.

When studying for the *Senior Studentship* of the Inns of Court, the writer carefully read through the above-mentioned works; and this little book is a methodical, though perhaps unscientific and defective, arrangement of the notes made on each chapter, subsequently compared, cut down and digested. It is believed that all the theories of Maine on the most important questions and subjects of dispute that have arisen among writers on Jurisprudence, and most of his criticisms that are of value to the student and of interest to the general reader, will be found in the following pages.

Both candidates and examiners should therefore find the book of great use, and it is hoped that it may also prove of interest to readers in general.

MORGAN EVANS.

Board of Executors Buildings,
Cape Town,
April 1896.

CONTENTS

THEORIES AND CRITICISMS OF SIR HENRY MAINE

PART I

EVOLUTION OF LAW

IN primitive society "Law," as understood and defined by the analytical school of jurists, does not exist.[1] The knowledge we possess of the most ancient legal systems is derived from the codes of Manu and Narada, the Brehon laws, the Twelve Tables, and Homer. Ancient codes of law are not the works of "legislators." It would be more correct to term those who promulged them judges;[2] for the codes are usually merely declaratory of unwritten customs observed from time immemorial: they are collections in writing of maxims and principles the knowledge of which had been kept secretly guarded in the memories of the members of the privileged oligarchies.[1] Anything new that they might have contained would consist of alterations or additions made to further the interests of the compilers.[3] In making the knowledge of law available to all, and in

[1] "Ancient Law," chap. i. [2] "Early History," lect. ii.
[3] "Village Communities," lect. ii.

preventing customs adopted in the infancy of the state from degenerating, they were of the greatest benefit.[1] They were often the direct results of the invention of writing. Some, and most of them, do not represent systems of usage or rules actually followed and observed at any one period of time, and most of them had very little order in their arrangement. They prove that at the times of their compilation there was no conception of "Law" as distinct from philosophy and religion.[2] Indeed, in the ancient codes of Manu and Narada the three subjects are entirely mixed up and confused, and the sacerdotal element in them has been much underrated. They do not confine themselves to an enunciation of legal rules, but contain minute directions as to what it is expedient to do in order to ensure the reaping of rewards in the life hereafter; and instead of being imperative, the language is frequently precatory in tone. They sketch the life of a good man; his early career of study and training in holy doctrines; his life as a member of the society in which he becomes a householder; and his old age, spent in the meditation and seclusion of a hermit.[3]

The Twelve Tables by no means constitute the earliest standpoint from which we take up the history of law.[4] The poems of Homer give the student of jurisprudence valuable information not to be dis-

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[1] "Early Law and Custom," chap. i.; "Ancient Law," chap. ii.

[2] *Ibid.*, chap. xi., lect. i., ii.

[3] "Early History," lect. xi.

[4] "Ancient Law," chap. i.; "Village Communities," lect. ii.

regarded. There, law is disclosed in the germ of Themistes, the judgments or "dooms" dictated by Themis, and claimed to be the result of inspiration. And these are among the earliest authoritative statements of right and wrong.

If the ancient codes fail to give much information as to the origin of law, they remove all doubt as to the origin of lawyers who were in ancient times identical with the priests.[1] In India and the East the Brahmans were in the ascendency, intellectually, physically and spiritually. The laws which to the modern mind are the most cruel and revolting were introduced by them from mercenary motives. The laws they aided in creating were "sanctioned" by penances; but those laws would not satisfy the requirements of the analytical school until the penances became enforced by the king. Though some of the elements of law are apparent more or less in mature systems of jurisprudence, it requires straining to discover them in all kinds of law at all epochs, and the more deeply we penetrate into the history of law the more difficult and impossible it becomes to uphold the truth of the analytical theory.[2] For it may be said that there are two types of society.[3] In the one the sovereign is a tax-imposing one, and does not trouble himself with legislation. There the "positive law" of Austin, with its command, duty and sanction, does not exist. Persia and Assyria

[1] "Early Law and Custom," chaps. ii., iii.

[2] "Ancient Law," chap. i.

[3] "Early History," lects. xii., xiii.

were such societies, and India also. Runjeet Singh was an absolute sovereign even in Austin's sense of the term; but the nearest approach to a law he ever enacted would amount to no more than a "particular command."

In the other type of society, there is a sovereign, the fountain and author, direct or indirect, of the law. There all the elements of "positive law" may be found. Custom exists side by side with this law, it is true; but it is "law" because the sovereign permits, and so tacitly "commands" it.[1] But in ancient societies, even where there were despotic sovereigns, and codes of law, customs and rules, observed from time immemorial, if we accept Austin's definition, these societies were "law"-less. "Morality" is the only term with which modern jurisprudence permits these laws to be designated, and to some extent this is true; for in some of the earliest societies laws only appear in the shape of awards, dooms and decisions. But in primitive conditions these would naturally resemble one another and be frequently repeated, and they would in time form a collection which would establish a "custom." "Custom," therefore, is the result of judgments, and does not exist, as is often supposed, prior to them. But this "custom" is not the law governing the masses. It only concerns the heads of families. In primitive society, if the people as a body are governed by anything, they are governed by the "caprice" of the heads of the many families composing the society.

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[1] *Et seq.*, "Ancient Law," chap. i.; "Early History," lects. xii., xiii.; "Village Communities," lects. ii., iii.

The origin of law, however, cannot be conclusively ascertained even from the old Indian codes. The inspired awards of Themis, dictated supernaturally to the kings, were perhaps the germs of customary law. When the kings, who were supposed to be supplied with an inexhaustive stock of these awards, gave way to other powers in the state, and the kingly office degenerated into that of a King Archon or a Rex Sacrificulus, customary law was deposited in the hands of, and administered by, the succeeding oligarchies. Though they did not claim divine inspiration, they kept the knowledge of the law a secret; and the maxims and principles they cherished in their memories constituted true "customary law." These, when writing was invented, were at last made known to all in the form of codes. Some codes may be a true collection of customs and rules actually in force at the time of their promulgation; but most contain, besides rules actually in force, much of what the authors thought ought to be law.

Hindu codes are rather codes of ritual than of law. The evolution of law can clearly be traced in the enforcing of penances by the sovereign whereby rules of conduct become compulsory. This is the unconscious addition of the sanction; and what was before a mere rule of morality, to be observed or not at the option of those in subjection, became law properly so called. The obedience to the law, however, is the result of habit rather than fear of the sanction, and few have the law in their minds or the sanction when engaged in the daily affairs of life.[1]

[1] "Early Law and Custom," chaps. i., ii.

PART II

POSITIVE LAW AND SOVEREIGNTY

THE analytical system could not have been conceived much earlier.[1] Austin should at the outset have clearly stated the objects of the science of jurisprudence.[2] He should have proceeded to analyse sovereignty before attempting to define law. The science of public law should not be so sternly distinguished from the science of ethics;[3] nor should the doctrine be taught that governments are not bound by obligations of truth, justice and humanity. The analytical system can only be applied with propriety to those states which have derived from the Roman law their ideas of legislation.[4] Even where the sovereign legislates in Austin's sense, the law is coerced by external power. Custom is law, according to Austin, because the sovereign may be deemed to command what he permits. He should have added that what he might alter, but does not, he commands also. His definitions are of varying practical value.[5] Words are taken by him out of their habitually associated ideas. His identification of the

[1] "Early History," lects. xii., xiii.

[2] *Ibid.*, lect. xii.

[3] "International Law."

[4] "Village Communities," lect. iii.; "Early History," lects. xii., xiii.

[5] *Ibid.*

law of nature with the law of God is absolutely valueless. His theory of sovereignty is objectionable, as it neglects the historical antecedents determining the existence of sovereignty. He does not recognise as a political and independent society a society having all the marks of sovereignty, because it does not approach a limit which he admits to be uncertain; but in appealing to absurdity he steps on ground dangerous to his own system. Hobbes differs from him in having a political rather than a scientific object; but he was right in speculating upon the origin of government, for its origin and several stages should be considered by the jurist. Though his theory of the original state being one of constant warfare may be true of man to man, it cannot be accepted to be true of tribe to tribe. What he says of the absolute power of the sovereign and its irresistibility may be true; but it is also true that moral and religious influences restrain its exercise.[1] Austin has selected[2] one sense of law. His ultimate object was codification. From his point of view international law is simply morality. But one sense of law is as good as another and as dignified, if it be consistently used. Austin has succeeded in showing the existence of a sanction in all positive law. But the assertion of his disciples that laws are obeyed through fear of the sanction is false. It is early teaching, inheritance, and perhaps inherited instincts, that have created the habit of obedience.

[1] "Early History," lects. xii., xiii.

[2] "International Law."

PART III

PRIMITIVE SOCIETY

THE rudiments of a social state are known to us by—(1) accounts of contemporary observers concerning a civilisation less advanced than their own, which constitute the best kind of evidence, though neglected, through contempt; (2) records preserved by particular races of their primitive history; and (3) ancient law.[1] Consanguinity or kinship is the earliest tie binding men in communities. It was regarded as an actual bond of union, real consanguinity, and so differed from the modern religious idea of universal brotherhood.[2] Primitive society was scanty and ceremonious, and consisted of a collection not of individuals but of families.[3] The existing family is the smallest group; and a number of families together make up the Gens; and an aggregation of houses forms the tribe; and there is theoretically one ancestor of all.[4] "The joint family" of the Hindus is an example of a body of kinsmen, who are joint in food, worship and estate; and Teutonic cultivating communities consisted of a number of families

[1] "Ancient Law," chap. v. [2] "Early History," lect. lii.
[3] "Ancient Law," chap. v.
[4] "Early History," chap. v.

standing in a proprietary relation to land.[1] In the patriarchal household the eldest male ascendant, the general term for whose power was probably "manus," is absolutely supreme; his dominion extends to life and death, as well over his children as his slaves: on his death his property is equally divided among his sons; sometimes the eldest, under the name of birthright, receives a double share,[2] or perhaps the whole on account of the customs and beliefs attached to ancestor-worship.[3] Just as corporations are now deemed to be unlimited in duration, patriarchal groups were considered, by primitive law, perpetual and unextinguishable;[4] and from this resulted the theory of identity of a dead man and his heirs.[5] The law, such as existed, did not affect individuals, but only the heads of families,[6] and the moral elevation or debasement of the former depended on his community: if a community sins, its guilt is greater than all the offences together of its members: if an individual is guilty, his descendants, kinsmen, or fellow-citizens suffer with or for him. The family, house and tribe of the Romans may be taken as types of the groups from which a state is constituted. Though every society regarded itself as descended from one original, this was not really the case; for each has records proving that aliens had from time to time been admitted who amalgamated with the

[1] "Village Communities," lect. iii.; *vide* p. 31, *infra*.
[2] "Ancient Law," chap. v.
[3] "Early Law and Custom," chap. iii.
[4] "Ancient Law," chap. v.
[5] *Ibid.*, chap. vi.
[6] *Et seq.*, *ibid.*, chaps. v., vi.

original brotherhood. The family was thus adulterated by their admission, which was the origin of the earliest of legal fictions, viz., adoption.[1] It was expedient that the incoming people should feign themselves related; and strangers sharing in sacrifice shared in the common lineage.[2] Adoption resulted also from ancestor-worship, owing to the strong desire that existed for male offspring.[3] If a Hindu had no children, he adopted a son with a view to the funeral cake, water, and solemn sacrifices;[4] and under the Brehon laws adopted sons, like natural ones, affected the Geilfine family.[5] When our information begins, the pater-familias had the "jus vitæ necisque" over his descendants, and so the power of inflicting uncontrolled corporal chastisement, or of modifying their personal condition, of marrying them to whomsoever he pleases, and divorcing them; of transferring them to another family, and of selling them. The old triple emancipation was evidence of an early feeling against the unnecessary prolongation of the patria-potestas; but though the powers over the persons might become nominal, the power over his descendants' property was for a long time always fully exercised. The "mund" of the Germans fell far short of the ancient Roman patria-potestas. The responsibility of the paterfamilias in the case of "noxa" points to the existence of duties which balanced his rights.[6]

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[1] "Ancient Law," chap. v. [2] *Ibid.*
[3] "Early Law and Custom," chap. iii.
[4] "Ancient Law," chap. vi. [5] "Early History," lect. vii.
[6] "Ancient Law," chap. v.

The worship of ancestors, which had a great influence on inheritance, and on the everyday life of the Hindus, was the practical religion of the greater part of the human race. The ancestors worshipped were the three whom it was possible to remember; but it is probable that the father's power is older than the practice of worshipping him. In the opinion of savages, a dead man differs little from one asleep: he is a living dreamer permanently passed into the land of dreams; but his life as a spirit, resembling his career as a man, does not diminish his interest in those he has known on earth. When ancestor-worship first arose, the father of the family was the paterfamilias of jurisprudence. Owing to the necessity that the worshipped and worshipper should be males, the strong desire to have male offspring led to a broad system of artificial affiliation; and as the eldest son was deemed the most likely to confer spiritual benefit on his father, he sometimes took the whole inheritance and provided for the others; but oftener he merely had the best portion: the prevailing doctrine was that there should be an equal division among all the sons, with only a slight advantage to the eldest. The tendency of ancestor-worship at first was to consolidate the constitution of the family, but ultimately to dissolve it.[1] Among the Hindus, the right to inherit a deceased's property was co-extensive with the duty of performing his obsequies; and if a person had no son, he adopted one, that he might have some one to fulfil this duty: in Roman law, adoptions and

[1] *Et sup.*, "Early Law and Custom," chap. iii.

inheritances are embraced in the "sacra."[1] The inability of women either to go through the funeral ceremonies of a deceased, or to worship her ancestors, had much to do with her incapacity with respect to property; but the Suttee had no connection, originally, with ancestor-worship, being a comparatively modern creation of the Brahmans.[2]

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[1] "Ancient Law," chap. vi. [2] "Early History," lect. xi.

PART IV

LEGAL FICTIONS AND EQUITY

WHEN primitive law has once been embodied in a code there is an end to what may be called its spontaneous development; and the distinction between stationary and progressive society begins to take effect.[1] After external completion, men do not want to improve their civil institutions. The rule is that society is stationary, the exception that it is progressive; and in progressive societies, as law is stable, in order that it may not limit civilisation, it must be brought into harmony with the advanced social necessities: the agencies by which it is so brought are Legal Fictions, Equity, and Legislation.

In Roman law the object of fictions was jurisdiction, and they resembled the allegations in English law in the Courts of King's Bench and Exchequer by which these Courts usurped the power of the Common Pleas. The term Legal Fiction is used to signify any assumption that a rule of law remains unchanged and that its operation is unaltered, the fact that it has undergone alteration being concealed or affected to be concealed. The "responsa prudentum"

[1] *Et seq.*, "Ancient Law," chaps. ii., iii., iv.

as well as English case-law rests on legal fictions. The legal fictions are invaluable as expedients of overcoming the rigidity of the law; but though to revile them is to betray ignorance of their peculiar office in the history of law, still they are the greatest obstacle to symmetrical classification; and they will have to be pruned away from English law, if it is ever to assume an orderly form. By the term Equity, is meant any body of rules existing by the side of the original law, founded on distinct principles, and, in virtue of a superior sanctity in those principles, incidentally claiming to supersede the original law. Equity differs from fictions in that the interference with the law is open and avowed: and differs from legislation in its claim to authority being founded on the special nature of its principles. The authority of legislation is independent of its principles, being founded on the authority of the enacting legislature. When a group of facts comes before an English Court for adjudication, it is taken for granted that there is somewhere a rule of known law concerning those facts; but as soon as judgment has been rendered and reported, it is admitted that a new decision has modified the law, or that the rule has been altogether changed. This is owing to the fact, probably, that a complete body of English law was supposed to exist "in gremio magistratum."

English practitioners have paradoxically said that, since the time when the Roman and Canon laws, which had been frequently, though not always wisely, borrowed by the English judges of the thirteenth

century, were closed as storehouses of law, nothing has been added to the basis of English law, except by equity and statute law. The "jus prudentibus compositum" differs from English equity and case-law in that it was not expounded by the Bench (for in Rome, during the Republic, there was no institution analogous to it), but the bar. But this fact did not popularise the law nor simplify the science of law, which might have been expected, seeing that the people were in direct contact with the bar, and the clients were the advocates' constituents. The growth and exuberance of principles in Roman law was fostered by the multiplication of cases, and by the competition, such as is unknown where there exists a bench, of the jurisconsults. When a difficulty came before the latter for their opinion, an entire class of questions, to the suggestion or invention of which there was no distinct check, was adduced and considered, though only slenderly connected with a particular feature of the original difficulty; and the "responsum" contemplated the circumstances as governed by a great principle or included in a sweeping rule.

The manner in which English law was enunciated seems to have been lost sight of; but it is certain that English law is poorer in wealth of legal principle than the laws of many modern nations which have built their walls on the *débris* of the Roman law. After the limitation imposed by Augustus with respect to the right of giving binding opinions, the statute law became voluminous; and after a civil commotion

among the Romans, there seems to have been an association between the settlement of a community and the enactment of a large body of statutes.

Many of the principles which lie deepest in the structure of English equity have come from the Canon law; and in the recorded "dicta" of Chancery judges there are entire passages from the Corpus Juris; for between the Chancellorships of Lord Talbot and Lord Eldon, English lawyers were fond of studying the mixed system of jurisprudence and morals of the Low Countries; and their opinions influenced the decisions of the Chancery judges. English equity is a system founded on moral rules; and these rules are the morality of past ages. Some writers wrongly assert that the founders of the present Chancery jurisprudence contemplated its present fixity of form; and others contend that the moral rules of the Court of Chancery fall short of the ethical standard of the present day: nothing is more distasteful to either class, or to the masses in general, than the admission that their moral progress is a substantive reality. By supposing a general right to superintend the administration of justice as a natural result of his paternal authority, equity was assumed to be invested in the king, and the same view appears in the doctrine that equity flows from the king's conscience.

In Rome the prætor was supposed to work the Jus Gentium into Roman jurisprudence; and equity is the exact point of contact between the Jus Gentium and Jus Naturale, where it first appears. "ισοτης," "the equality of laws," an equal administration of the civil law among

the citizens, on which the Greek democracies prided themselves, had originally little in common with the Roman equity, which signified an applicability of a law, not the "civil" law, to a class not necessarily citizen, but including foreigners, and, for some purposes, slaves; and "æqus" carried with it the sense of "levelling," the characteristic of the Jus Gentium. The neglect of demarcation seems the principal feature of the Jus Gentium as depicted in Æquitas; and ultimately notions of "ισοτης" clustered round the latter. The whole body of Roman equity jurisprudence was at last contained in the Julian Edict; and after the latter it was further developed by the jurisconsults, who had always influenced the open legislation—unlike the insensible acts of the Chancellors—of the prætors; but after Alexander Severus it ceased to expand; and, like Lord Eldon, the jurists devoted their time to explaining and harmonising it, leaving to Justinian the task of completely fusing Law and Equity.[1]

[1] *Et sup.*, "Ancient Law," chaps. ii., iii., iv.

PART V

LAW OF NATURE AND ETHICS

FROM the disturbed state of Italy, and the commercial relations existing between the great cities of the Roman world and Rome, there resulted a great immigration of foreigners to the latter city; but, unlike the usages of modern times, these strangers were not absorbed in the mass of citizens, for the absolute exclusion of foreigners pervaded the civil law, according to which they had no share in any institution coeval with the State.[1] The Romans, being thus unwilling to decide disputes between foreigners, or Romans and foreigners, according to the civil law, through their disinclination to share with aliens the supposed advantages of the Roman law, and their disdain of all foreign law, were necessarily driven to the invention of a "Jus Gentium," so called because it was founded on the rules of the different Italian communities, being at the time "all the nations" observed by them. The results, which modern ideas would conduct us to, being as nearly as possible the reverse of those instinctively brought home to the primitive Roman.

Φυσις meant "nature." "Nature" originally denoted

[1] *Et seq.*, "Ancient Law," chaps. iii., iv.

the material universe, the physical world regarded as the result of some primordial element or law; and the old Greek philosopher explained "movement," "fire," "moisture," and "generation" as the fabrics of creation: nature was the manifestation of a principle. In their conception of nature, the later Greek sects added the "moral" to the physical world; and to live according to "nature," to rise above the disorderly habits and gross indulgences of the vulgar to the higher laws of action which nothing but self-denial and self-command would enable the aspirant to observe, came to be considered the end for which man was created, and was the sum of the tenets of the Stoic philosophy. On the subjugation of Greece that philosophy made instantaneous progress in Roman society; and though lawyers are generally the head of the party resisting anything new, we may feel certain that, in the front of the disciples of the Greek school, there figured Roman jurists, together with their masters, the Antonine Cæsars. It was soon believed that the lost code of nature had been found in the Jus Gentium; the latter became the model to be followed for all laws, and it was now the prætor's duty to supersede the civil law by the Edict. Simplicity, symmetry, and intelligibility came to be regarded as the characteristics of all good legal systems. Æquitas, or Equity, is the exact point of contact between the Jus Gentium and Jus Naturale: by the time of Justinian they were identical, in spite of Ulpian's attempt at discrimination. The growth of Christianity was accompanied with a tendency to look to the "future," and not to the past; and writers appeared

who maintained that the code of nature exists in the future, not heeding the fact that ancient literature gives few or no hints that the growth of society is from worse to better.

The natural law of the jurisconsults was distinctly conceived by them as a system which ought gradually to absorb civil laws without superseding them, as long as they remained unrepealed ; it thus escaped from the first of the two dangers to which law in its infancy appears to be liable—viz., that it may be too rapidly developed. This conception was valuable and serviceable in that it kept before the mental vision a type of perfect law, not entirely the product of imagination, which was deemed to underlie the existing law, through which it must be looked for, in order to take advantage of its remedial functions. The second danger threatening infant law is the rigidity arising from association and identification with religion, which chains down the mass to those views of life and conduct entertained when their usages were first consolidated into a systematic form. The secret of Bentham's influence is his success in showing the importance of having a distinct object to aim at in the pursuit of improvement, and the clear rule of reform he gave.

The theory of the law of nature is the source of almost all the special ideas diffused over the Western world by France during the last hundred years ; but it is questionable whether its influence has been exerted for good or evil. The juridical school took its rise in Italy, and schools in all parts of the Continent were founded by Italian emissaries ; the lawyers of France

joined an alliance with the kings of the houses of Capet and Valois, and it was as much through their interpretation of the rules of feudal succession as by the power of the sword that the French monarchy grew out of an agglomeration of provinces and dependencies. Practitioners familiar with the Corpus Juria found it easy to supply any quantity of "general formulas," which were greatly admired at the time; and the universal vagueness of ideas as to the degree and nature of the authority residing in written texts also added to the authority of the lawyers.

"Ita scriptum est" was sufficient to silence all objections, and the most one could do was to cite some counter proposition from the Code or Pandects: and this explains the motive of the author of the "Forged Decretals," and the plagiarisms of Bracton, a compendium of pure English law of the time of Henry III., the entire form and a third of the contents of which were directly borrowed from the Corpus Juris. From the accession of the branch of Valois-Angoulême down to the Revolution, French lawyers formed the best instructed and perhaps most powerful class, and excelled in their qualities of advocate, legislator and judge, their European compeers; but France was smitten with the curse of an anomalous and dissonant jurisprudence beyond any other country in Europe. The Pays du Droit Écrit acknowledged the Roman law as the basis of its jurisprudence; the Pays du Droit Coutumier admitted it only so far as it supplied general forms of expression and of juridical reasoning reconcilable with local usages. The diversity of law

existed in France while the monarchy was constantly strengthening itself, and after a fervid national spirit had been developed among the people. The French lawyers became passionate enthusiasts, and the law of nature became the common law of France, or at least the administration of its dignity and claims was the one tenet subscribed by them. Dumoulin, the highest authority on French customary law, has extravagant passages on the law of nature; but Montesquieu proceeded on that historical method before which the law of nature could never maintain its footing for an instant; but his influence was banished by Rousseau. The first attempt to re-erect the fallen edifice was commenced by Bale, and in part by Locke, and consummated by Voltaire. Rousseau's belief was that perfect social order could be evolved from an unassisted state of nature, a social order wholly irrespective of the actual condition of the world, and wholly unlike it. The question is, what were the causes giving this idea such prominence a hundred years ago? The Greek religion was dissipated in imaginary myths; Oriental religions were lost in vain cosmogonies; the study of the early history of the Jews was prevented by the prejudices of the times; for Rousseau and Voltaire disdained Hebrew religious antiquities, the entire Pentateuch being treated by them as a forgery. The philosophers of France had nothing left but to plunge themselves into the superstition of the lawyers, the law of nature. A philosophy founded on a natural law cannot but be antagonistic to the historical method allied with political and social tendencies; the doctrines

of nature preserved their energy, and helped most powerfully the way to the grosser disappointments in which the French Revolution was fertile, and in the end brought about an impatience of experience, and vices of mental habit which led to a disdain of all positive law; and as the times grow darker, appeals to the law of nature grow thicker. It is surprising to note how many of the Sophismes Anarchiques are derived from the Roman hypothesis in its French transformation. The doctrine "all men are equal," meant literally what it said, in the eyes of the Antonine jurisconsults; as meaning "all men ought to be equal," it was credited by the modern civilians, arising from their "law of nature," and in the middle of the eighteenth century passed over, with the Jus Naturale, to America: of all the principles of 1789, it is the one which has been the least strenuously assailed, most thoroughly leavens modern opinion, and which promises to modify most deeply the constitution of society and the politics of States.[1]

The greatest function of the law of nature was discharged in giving birth to modern international law,[2] and the Jus Gentium, which was elevated to the dignity of international law during the Roman peace is the element of Roman law in the latter.[3]

The Brehon lawyers speak of a law of nature which term, in the Senchus Mor, is applied to the ancient pre-Christian ingredient in the law.[4]

[1] *Et sup.*, "Ancient Law," chaps. iii., iv. [2] *Ibid.*, chap iv.
[3] "International Law," lects. i., ii.
[4] "Early History," chap. ii.

Moral philosophy previously to the break in its history by Kant is extraordinarily indebted to Roman jurisprudence. It has almost wholly lost its older meaning except where it is at present preserved in a debased form in the "casuistry" still cultivated by Roman Catholic theologians. The science was constructed by taking principles of conduct from the system of the Church ; and by using the language and methods of jurisprudence for their expression and expansion. But the amount of Roman law has sensibly diminished by the time we come to the Spanish moralists. The casuists and the followers of Grotius formed two great schools of thought ; but Grotius' book is rather an attempt to determine the law of nature. All philosophy of right and wrong termed "casuistry" has origination in the distinction between mortal and venal sin : it received its last blow in the "Provincial Letters" of Pascal. The ancient Greeks never felt seriously perplexed by the great questions of free will and necessity ; nor ever showed the smallest capacity for producing a philosophy of law, which latter was founded with respect to modern Europe, by the school of Boulogne.[1]

[1] "Ancient Law," chap. ix.

PART VI

INTERNATIONAL LAW[1]

THE confusion between the "Jus Gentium," and international law is entirely modern, for the classical expression for the law of war, the law of negotiation and diplomacy is "Jus Feciale," which is derived from φυσις (*i.e.* "nature"), [*vide* notes on Law of Nature and Equity].[2] Modern international law is, however, partly derived from the law of nature [*vide* notes on Modern History of the Law of Nature], and its giving birth to international law is the greatest function of the latter. The law of nations is founded on two postulates. The first is that there is a determinable law of nature. Grotius and his successors took this assumption directly from the Romans: but they differed widely from the latter in their ideas as to the mode of determination. Setting aside the conventional part, most of the law of nations as created by them consists of Roman law, and doctrines of jurisconsults in harmony with the Jus Gentium. It is difficult to know whether their subject is law or morality; and whether the state of international law they describe is actual or

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[1] "Ancient Law," chaps. iii., iv. "International Law," lects. i., ii., &c. [2] "International Law," lects. i., ii.

ideal. The second assumption is that natural law is binding on States "inter se." But there is no passage in Roman law which proves that the jurisconsults believed natural law to have had any obligatory force between independent commonwealths. The condition of Europe was long such as to preclude any universal reception of a law of nations, which was supposed by early modern interpreters of Roman jurisprudence, misconceiving the meaning of "Jus Gentium," to have been bequeathed by the Romans as a system of rules for the adjustment of international transactions. Ayala and Grotius adopted from the Antonine jurists the conclusion that the Jus Gentium and Jus Naturale were identical, and maintained that the law of nature is the code of states; and they were rewarded with the enthusiastic assent of the whole of Europe. It is essential that commonwealths should be considered equal, if the society of nations is to be governed by international law. The part of the latter referring to "dominum" is pure Roman property law, as also are the rules relating to the acquisition of territory and moderation of wars. For the Jus Gentium to be applicable, sovereigns must be deemed related to one another like ordinary Roman proprietors, and sovereignty must be territorial, and the sovereign must be absolute owner of the territory of the states. But the conception of territorial sovereignty was not entertained during a large portion of modern history. After the barbarian irruptions had subsided the notion of sovereignty assumed was tribe sovereignty, and the claims of the several tribes, who considered themselves nomad hordes, were

not based on territorial possession; the Merovingian chieftains, descendants of Clovis, when part of Transalpine Gaul and Germany had become France, were and called themselves kings of the Franks; and, when used, territorial titles were considered merely convenient as designating the rulers of portions of the tribal possessions; but the king of the whole tribe was king of his people, not of his lands. The idea of universal dominion, "aut Cæsar aut nullus," was the alternative of tribal sovereignty. If a chieftain would no longer be king of his tribe, he must be king of the world with the full prerogatives of the Byzantine emperors; and Charlemagne only took the course which the characteristic ideas of the age permitted him to follow. Territorial sovereignty was the distinct offshoot of feudalism, which, limiting personal duties, limited personal rights to the land.

The connection of confederate states in the Romano-German Empire was regulated by means of Imperial Constitutions; and the German lawyers considered the Jus Gentium inapplicable. With the decay of feudal and ecclesiastical influences during the fourteenth and especially the fifteenth centuries, the views of Ayala and Grotius progressed. The marvellous success of the "De Jure Belli et Pacis" may be partly explained by the horrors of the Thirty Years' War. As it is assumed by the theory of international law that states are related to one another in a state of nature, and the component atoms of this society are independent and insulated; if an universal suzerainty had been admitted, the labours of Grotius would have been idle,

and if sovereignty had not become territorial, three parts of the Grotian theory would have been incapable of application.[1]

The term international law has been limited to those rules existing as the law of nations between Grotius and Vattel.[2] In the time of Grotius, war was not even an art; but at present it might be termed a science. 1. The acceptance of international law by nations is a late stage in the diffusion of Roman law, never wholly lost, over Europe. 2. International law was generated before the era of legislation, and, like Roman law, did not spread over the world by legislation, but possessed a power of self-propagation. 3. The Roman element in international law was the Jus Gentium part of Roman law. The influence of Grotius is still perceptible in modern manuals of war.

In the world divided between the Roman Emperor and the King of Persia, there would be little room or need for international law. Some writers consider that the original Jus Gentium was often used as law binding on tribes and nations as such; but the Jus Gentium was not exalted to international law till, probably, the Roman peace, which transformed the Roman law from a technical to a highly plastic system. There are two theories concerning the foundation of international law—viz., (1) It is a system of positive institutions founded on consent and usage; (2) it is founded on a system of rules applied to nations as

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[1] *Et sup.*, "Ancient Law," chaps. iii., iv.

[2] *Et seq.*, "International Law," lects. i., ii., iii.

moral persons, &c.; but neither are worth adopting. The law of nations, of which there is a natural as well as a positive, consists of: (1) general principles of right and justice suitable for the government of individuals and nations; (2) usages, customs, and opinions; (3) and, lastly, a code of positive law. Individual and international morality are parts of one and the same science; and the whole question of international law, if admitted to be derived from the law of God, is one of ethics; and so there would be no demand for a sanction. International law has, like systems of morals and religion accompanied by laws, gained currency through its own moral influence. What Justice Stephen says of the sources of religion applies to morality and to the law of nations. The latter is a code in the same sense as Eastern collections of rules, founded on a new morality; and, on its first appearance, it excited unbounded enthusiasm. Indeed, Grotius' book shows that international law is essentially a moral and religious system. Austin has not succeeded in injuring the force of international law; for the latter, it must be remembered, has but slender connection with "positive law"; and one sense of law, if used consistently, is as good as any other. It is a habit of mind, not fear of a sanction, that causes law to be obeyed; and if they have not created a sanction, the founders of international law, by creating a strong approval of a certain body of rules, have created this law-abiding sentiment.

INTERNATIONAL SOVEREIGNTY [1]

The view of sovereignty entertained by the earliest international jurists was at bottom "dominum"; and individuals (the several sovereigns) were considered the subjects of international law; which fact was favourable to the latter, as it enabled states to be regarded as moral beings bound by moral rules. The indivisibility of sovereignty insisted upon by Austin does not belong to sovereignty in international law.

MARE LIBERUM [2]

The earliest development of international law consisted in a movement from "mare liberum" to "mare clausum"; for originally the sea was common and free only in the sense of being universally open to depredation; but the progress thenceforward was from "mare clausum" to "mare liberum." The claims of England, which have almost dwindled to the "King's Chambers," owing to the expenses of lighting, &c., are really disadvantageous to her.

ARBITRATION [3]

As nations fight because they cannot go to law, disputes should be referred to arbitration. But in international law arbitration is peculiar, as there is no court of justice, nor the force underlying its operation that there

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[1] "International Law," lects. ii., iii., xi.

[2] *Ibid.*, lect. iv. [3] *Ibid.*, lect. xii.

is in municipal law; and this want of coercive power is a great drawback. It may also be objected to arbitration that there are some states which, just as insurance companies in municipal arbitration, are unpopular litigants. A third objection is the unsatisfactory composition of courts of arbitration; and the fact that jurists are indispensable, and what is now a jurist? The courts do not exercise a continuous jurisdiction; and, fifthly, the future effect of decisions on the rights of neutrals is not sufficiently kept in view.

The formations of great empires, the institution of forms of trial, and fines; the arbitration, to some extent in Christendom, of the Pope; and the influence of writers on international law, have, heretofore, tended to prevent wars. As to modern proposals to abate war, there is a great deal in Molinari's League of Neutral Powers, by which one of the duties of neutrality is to thwart belligerency; and the breaking out of war becomes a "casus belli" for other states. Could it not be arranged that all the sovereigns of civilised nations should agree to constitute a single and permanent court, board, or assemblage of arbitrators who may in future act as referees in any questions submitted to them by any community or communities?

Belligerency can only be arrested by sacrifices on the part of states when at peace with one another, and desirous of its continuance; and it is only by local isolation that it can possibly be extinguished.[1]

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[1] "International Law," lect. xii.

PART VII

ORIGIN AND HISTORY OF PROPERTY

PROPERTY in land as known to communities of the Aryan race has arisen from (1) the disentanglement of the individual from the collective rights in the family or tribe; (2) from the growth and transmutation of the sovereignty of the chief.[1] The modern English conception of absolute property is descended from the special proprietorship of the chief, first over his own domain lands, and then over the tribal lands. Property in land has grown out of the dissolution of those bodies of men in which the idea of common ancestry has been entirely lost, as in the manor, or fief; the Indian village communities, bodies of men simply held together by the land they occupy, as opposed to the Russian village communities, who believe in their common ancestry, and have a periodical redistribution of the land; the house community of the Sclavonians, which absorbs strangers; and the joint family of the Hindus, a body of actual kinsmen, joint in food, worship, and estate.[2] From the Brehon law[3] we find that in the Irish tribe, a corporate organic and self-sustaining unit, a holder of

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[1] *Et seq.*, "Early History," lect. v.

[2] *Ibid.*, lect. iii.

[3] *Ibid.*, lect. iv.

an allotment cannot alienate what he has as tribesman without the consent of his tribe, though he can do so in case of great necessity, to the extent of one half; and this is the case in Russian and Indian village communities; and under the Hindu law, all the gains of a professional man, unless he has become learned otherwise than at the expense of his family, become part of the family property.

Of the three theories[1] concerning the relation between the chief and the tribe, viz., (1) the chiefs owned the land and were oppressed rack-renters; (2) the Norman barons became such rack-renting chiefs; (3) the land belonged absolutely to the tribe, and the chief merely received a remuneration as administrative officer; the last is the true one. The tribe's territory eventually became permanently alienated to sub-tribes. The power of the chief grew through the colonising of waste lands and commendation. Next to land,[2] cattle has been the most important commodity, which, at first valuable for flesh and milk, and also for manure and the plough, became the medium of exchange; and the Brehon fines were paid in cattle. The system of giving and receiving stock in the Senchus Mor is explained by the fact that the chief had more cattle than pasture.

From the practice of the chief giving stock and the tribesmen taking it, have grown the right to rent, and the liability to pay it; and most of the incidents of feudal tenure, vassalage, and the effects of commenda-

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[1] *Et seq.*, "Early History," lect. v.

[2] *Et seq.*, *Ibid.*, lect. vi.

tion. The chiefs themselves took stock, and in time the taking became a fiction, and was commendation; and the Brehon tracts show that the natural growth of feudalism formed part of the process by which the chief's authority was extended, and the derivation of "feud," &c., from "emphyteusis," is abandoned, it being really derived from "vieh," which, like "pecus," originally meant cattle, but came to mean property generally.

The Romans [1] classed the modes of acquiring property among the laws of nature; and with them "occupation" was the advisedly taking possession of what at the moment was the property of no one, with the view of acquiring ownership in it. They have always made the conjecture that the institution of property is not so old as the existence of mankind. Blackstone's theory of the origin of property is untenable; for it is probable that the occupant's right of possession would only last as long as he had the physical power of enforcing it, which would be a very short time. The object of those who say that occupancy first gave a right against the world to an exclusive but temporary enjoyment, which right afterwards remained exclusive, but became perpetual, was to reconcile the doctrine that in a state of nature "res nullius" became property through occupancy, with their inference that the patriarchs in Scripture did not at first permanently appropriate the soil.

Savigny has laid down that all property is founded

[1] *Et seq.*, "Ancient Law," chap. viii.

on adverse possession ripened by prescription ; but this statement is made only in respect to Roman law ; and we must consider him to assert that we can get no further than a conception of ownership involving the following three elements : possession, adverseness of possession—a holding, not permissive or subordinate, but exclusive, against the world—and prescription, *i.e.*, the period of time during which the adverse possession has uninterruptedly continued. This canon is valuable in that it draws our attention to the weakest point of the theory. The true basis of the theory seems to be the popular notion that an occupant becomes owner because everything valuable is deemed to have some owner, and no one can be pointed out with a better right than the occupant. The popular impression as to the part played by occupancy directly reverses the truth ; for the acts and motives supposed by the theories of occupancy, are those of individuals ; but joint ownership and not separate ownership is the really archaic institution ; the impression that individual proprietorship is the normal, having been derived from the Roman law, transformed by the theory of natural law ; and the latter differed from the former in the account it took of individuals, its greatest service being the enfranchising them from the authority of archaic society.[1]

The Mahometan theory of ownership was that all private property in land existed by the sufferance of the sovereign, who was the absolute owner of all land.[2]

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[1] *Et sup.*, "Ancient Law."

[2] "Village Communities," lect. iv.

The distinction[1] of "movables" and "immovables" is modern. The former corresponded with "things destructible by fire"; and "fixtures" came to be included among "immovables," though leases in English law are included among "personalty."

"Allod," as distinguished from "feud," originally signified an aliquot part, and was formerly restricted to certain property held by freemen; and "feud" was originally restricted to that held by servants.[1]

The history[2] of the Roman law of property is the history of the assimilation of "res mancipi" and "res nec mancipi"; of European property law, it is the history of the subversion of the feudalised law of land by the Romanised law of movables. In Roman law the division into "movables and immovables" was but slowly developed. "Res mancipi" at first enjoyed precedence just as heritable property in Scotland, and realty in England; and in Roman law those things first known as objects of enjoyment were emphatically dignified with the name of property; and this is why the most costly jewels never ranked as "res mancipi." After Justinian abolished the distinction, the fact of "traditio" becoming the sole conveyance, led the jurisconsults to a belief that which is exactly the reverse of the truth—viz., that "traditio" is more ancient than mancipation.

All Germanic peoples, except the Anglo-Saxons, forbade alienations which were not consented to by the

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[1] "Early Law and Custom," chap. x.

[2] "Ancient Law," chap. viii.

male children; and they were altogether prohibited by the primitive law of the Sclavonians.[1] The German rules for transfer of property outside the allod, *e.g.*, the "whergeld," and "reifus," originated in Roman law. The English distinction has been between land (with which ranked, *e.g.*, heirlooms) and goods. The reason why a Statute of Limitations was obtained so late in English law was the influence of the Canon law, which discredited prescription in accordance with the doctrine of the scholastic jurists, of the realistic sect, concerning the indestructibility of rights. An expedient, resembling the "in jure cessio," suggested itself to our forefathers and produced the "Fines and Recoveries." In Roman law, anything corresponding to the "injunction" of the Chancery Court, in the case of "bonorum possessio," was unnecessary, owing to the same Court administering law and equity. The special proprietorship of the mortgagor, *cestui-que-trust*, &c., in English law, resembled the "bonorum possessio" of Roman law. The distinction between Quiritarian and Bonitarian ownership, has had nothing to do with feudalism; and it was not the jurisprudence of Justinian, but the undigested system of Western Europe that "clothed with flesh and muscle the scanty skeleton of barbarian usage."

The "latifundia" of the Roman patricians were cultivated by slave-gangs; and the practice of letting out "agri vectigales" began with the "municipia," and was followed by individuals. The prætor recognised

[1] *Et seq.*, "Ancient Law," chap. viii.

the tenant as having an "emphyteusis" proprietorship; and the slave-gangs of the patricians, becoming "coloni," rendered to the landlord a fixed portion of the crop. The "coloni medietarii" reserved half the produce for the owner, and were the origin of the "metayer" system. It was on the terms of an "emphyteusis," but garrison duty taking the place of rent, that veterans occupied the "agri limitrophi"; and it is by the fact of the grantee's heir succeeding to the "emphyteusis" that the tendency of "benefices" to become hereditary is explained, the duty of gratitude and of providing dowries, &c., being derived from the ancient relations between "patrones" and "clientes."

There are diverse alleged origins of feudalism,[1] among which are numbered, firstly, the occupation of the "agri limitrophi" by the veterans; the ancient relations existing between the "patrones" and "clientes"; the "beneficia," by the conquering Teutonic kings, which like emphyteusis (a fourth), were not at first hereditary; the tenancy of "fuidhirs;" and the "taking stock" from the chiefs, the term feud being derived from "fihu," the stock—*i.e.*, cattle—taken. When land became more valuable than cattle, gifts of the former took the place of gifts of the cattle, and this explains the transformation of the legal aspect of landed property.

The third of the above explanations of the origin of feudalism, the "beneficia," is insufficient.[2] The autocratically governed manorial group resembled and suc-

[1] "Early Law and Custom," chap. x.

[2] *Et seq.*, "Village Communities," lect. v.

ceeded the cultivating group, which was democratic; and the rights of the free tenants remained after the waste land of the community had become the lord's waste, though theoretically by the lord's sufferance; and the free tenants correspond, in the main, to the free heads of the households of the old village community: the Manorial Courts, Court-Leet, Court-Baron, and Customary Court of the Manor, are all descended from the township—the tie connecting the common interests of the cultivators; and the encroachments of the lord were in proportion to the uncertainty of the rights of the community. Under the Roman law "res nullius" were reserved to the community; under feudal law they belonged to the lord. According to the German writers, the "great cause of feudalisation" was inter-tribal war; when conquered, the waste was either colonised, the effect of which was "inequality," or restored entire to be held in dependence, the effect of which was "suzerainty" or "lordship"; and from the "families" military leaders were chosen with political, judicial, and military power, with a share of the land.[1] Though this theory thus accounts for all the elements of feudalism, the system in its ultimate development is the result of a double set of influences, the above, and another coming into existence when grants of national waste or conquered land were made, after the powerful Teutonic monarchies were formed by the sovereign. The reason why feudalisation, once at work in India, was never completed there, is that the kings did not trouble them-

[1] *Et seq.*, "Early History," lect. v.

selves about the cultivating societies; and owing to the greater wars, there was no time for inter-tribal fighting.

From the growth and transmutation of the power of the chief have arisen certain rights to dues and certain monopolies and primogeniture. In France, as the land was mostly held by the peasantry, the nobles lived, not on rent, but on feudal dues; and the law of the people became, though it was just the contrary in England, the land law of the nobles. Feudalism[1] has, according to Bishop Stubbs, arisen from the benefice and commendation; and the reasons are to be looked for in the general disorders of the times: it is probable that civil and criminal responsibility had some effect. As to the practice of "giving stock," the more stock he received, the lower sank the tribesman. There were two classes of tenants: the "saer" and the "daer" tenants. The former took a small amount of stock and remained free, and had the use of the cattle; but they had to give up, for seven years, all increase and milk, paying homage also, to the chief, and performing manual labour for him, or, in lieu thereof, military service. The "daer" tenant laboured for the chief, and provided him with a calf and refections if he received three heifers. The chief's ownership of stock is illustrated by the English "heriot." The "daer" tenant was owner of his land, and so differed from a "metayer" tenant, and the acceptance of stock by him was discouraged by his tribe.

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[1] *Et seq.*, "Early History," lect. vi.

Dr. Sullivan derives the words "feud," &c., from "fuidhir." The fuidhirs were servile denizens working for a tribe, or for the chief to whom they paid rent, and who settled some of them on unappropriated tribal lands. They were tenants at will, and rack-rentable; their position was inferior to that of the "daer" tenants; and their having no status rather than degradation, were the cause of their wretchedness.[1]

RENT[2]

The right to rent and liability to pay it has originated from the practice of giving stock and receiving it from the chief by the tribesman.[3] It is highly probable that the various layers of the society of a village community were connected by a systematic payment of rent. As soon as a community has become a close corporation, new-comers would be admitted only on the condition of rendering service or the paying of rent. Oriental sovereigns take a share of the produce of the soil; and it was by assignments of such, and not by rent, that such nobility as exists is supported. The fund out of which rent is provided is a British creation. In village communities, which do not show that mere lapse of time conferred any right on one section of the group as against the other, it is admitted that rent never has been paid, and evictions are rare. The most ancient

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[1] "Early History," lect. vi.

[2] "Village Communities," lect. vi.

[3] "Early History," lect. vi.

rules concerning rent are contained in the Senchus Mor, according to which the three rents are "rack," "fair," and "stipulated" rents. The first was from a stranger tribe; and the "fair" was paid by the tribe's members; whilst the "stipulated" was paid equally by the tribe and the stranger tribe.

PART VIII

INTESTATE SUCCESSION

INTESTATE is the most ancient succession in spite of the doctrine that testamentary is the natural one.[1] When a family became totally extinct, the tribe to which it belonged succeeded to the property.[2] Where individuals of the family had property, the family in some way or other succeeded; and after wills had come into use, the laws of Solon, the Roman law, and the will of Bengal prohibited the disinheriting of certain relatives. Under the Mosaic system all the kindred were entitled to succeed, and Hindu male children, like the ancient Germans, were co-proprietors with the father, though to property other than the "allod" German women and their children could succeed; and equal distribution is that ordained under the French Code.[3]

Among the Hindus the instant a son is born he acquires a vested right in his father's property, which cannot be sold without recognition of his joint ownership; and on attaining majority, he can, without waiting for his parent's death, dispense with any

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[1] "Ancient Law," chap. vi. [2] *Ibid.*, chap. viii.
[3] *Ibid.*, *et seq.*, chap. vii.

necessity for succession "ab intestato," and compel partition of the estate. In most archaic societies intestate succession is "per capita"; then comes succession "per stirpes," and lastly the property of a deceased is distributed among his direct descendants.[1] The connection between succession and the performance of a dead man's obsequies was intimate; and it was owing to the idea that the eldest son was the most likely to confer spiritual benefit on his father, that he succeeded to more of the property than the other sons, and sometimes to the whole, though equal distribution was the most general; and as they could not worship their ancestors satisfactorily, this was the reason why women were excluded from the succession, though when it agreed with the interests of the Brahmans, the priests and lawyers allow them to succeed;[2] but later they objected to women's succeeding at all; and ultimately their dislike created the Suttee.[3] Where a son had a birthright (as the eldest son under the influence of ancestor-worship) its object was generally to secure impartial distribution; and although, as has been already stated, the eldest son sometimes succeeded to the whole of the deceased's estate, "primogeniture" was unknown to the classic world.[4] It is, as a rule of succession to property, a product of tribal ownership in its decay and the growth and transmutation of the power of the chief,[5] and it arose with the irruption of the

[1] "Early History," lect. vii.

[2] *Et sup.*, "Early Law and Custom," chap. iii.

[3] "Early History," lect. xi.

[4] *Ibid.*, lect. vii.

[5] *Ibid.*, lects. v., vii.

barbarians, when election became necessary. Its origin from benefices, distributed on a great scale by Charlemagne, may be thus explained: the beneficiaries succeeded, through the feebleness of Charlemagne's successors, in enlarging their tenure and continuing their land in their families after death; and they agreed, as to what should be the rules governing the succession, with the grantors; and the benefices became, like emphyteusis,[1] hereditary; and the popularity of allowing the eldest son alone to succeed and become legal proprietor of the inheritance led to the mode of succession called primogeniture. In a patriarchally governed group the eldest son might succeed to the government of the agnatic group, *i.e.*, to the "political power," and to the absolute disposal of the property; but he was not a true proprietor; and when the group of kinsmen ceased to be governed by an hereditary chief the domain was equally divided among all. But Roman jurisprudence looked upon uncontrolled power over property as equivalent to ownership; and the contact of the refined and barbarous notion created the conception of primogeniture.[2]

Prior to the introduction of English law, Irish land descended according to the rules of Tanistry, or Gavelkind.[3] On the death of the landowner, all the land of the sept was redistributed, the male members thereof, including bastards, being the successors.

The successor to the Irish chieftaincy was the eldest

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[1] "Ancient Law," chap. viii. [2] *Et sup.*, "Ancient Law."
[3] *Et seq.*, "Early History," lects. iv., vii.

and worthiest in blood, as a brother. Doubt existed up to the time of Henry II. as to whether the deceased's son or brother had the better right to succeed. All rules of inheritance are made up of the *débris* of the various forms which the family has assumed ; and primogeniture is a political not a tribal institution. In the succession to abbacies, blood relatives of the deceased abbots were preferred. In India literary fosterage created certain rights of succession.[1] In ancient codes of law, the rules relating to intestate succession were not treated of as being the most important, precedence being given to procedure and thefts.[2]

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[1] *Et sup.*, "Early History," lects. iv., vii.

[2] "Early Law and Custom," chap. xi.

PART IX

TESTAMENTARY SUCCESSION

In Europe[1] the barbarians were strangers to any such conception as that of a will, which they ultimately derived from the Romans. As religious foundations derived their temporal possessions chiefly from private bequests, it is not surprising that the earliest provincial councils condemned those who denied the sanctity of wills: it was the influence of the Church that chiefly prevented discontinuity in the history of testamentary law.

The jurists of the seventeenth century, in maintaining that succession "ex testamento" is the natural and normal mode of succession which ought to be followed primarily, imply either that testamentary succession is universal, which is untenable, or that nations are prompted to sanction it by an original impulse or instinct, which is contrary to the best ascertained facts in the early history of law: the truth is that intestate inheritance is a more ancient institution than testamentary succession. It may be that the Athenian will, an inchoate testament, was indigenous; but the rudimentary will of the Jews was probably derived from their contact with the

[1] *Et seq.*, "Ancient Law," chap. vi.

Romans ; and some suppose that the will of Bengal was an invention of Anglo-Indian lawyers, for among the Hindus adoption filled the place of wills. The leges Barbarorum were destitute of any traces of testamentary succession.

The cause of the assertion that all testaments were originally legislative enactments is that the earliest Roman testaments were executed by the "comitia curiata" ; but the modern will is not descended from the testament "calatis commitiis." The latter will probably originated from the reversionary rights of the Gentiles. There was a time when the will did not take effect at death only, was not secret, was irrevocable ; and the invention of the Romans was originally looked upon, not as a contrivance for parting property from the family, but as a means of making better provisions for the members of the household than could be secured by the rules of intestate succession ; and this accounts for the mode of inheritance in the case of sovereignty. It was an instrument regulating the devolution of the "family," declaring the succession to the chieftaincy ; for primitive society consists of "family" units ; and the notion of a will was inextricably mixed up and confounded with the theory of a man's posthumous existence in the person of his heir, the notion that a man never dies being the centre round which the whole law of testamentary and intestate succession circles ; though the theory of identity is much older than any form or phrase of succession "ex testamento." It is thus intimately connected with the "sacra," which acquire increased importance whenever the continuous existence

of the family is endangered ; and which embraced, in the time even of Cicero,[1] inheritances and adoption, on the former of which he says they constituted an intolerable burden.

The character of the "hæres" was the same whether he took "ab intestato" or by testament ; and "hæreditas est successio in universum jus quod defunctus habuit" ; and unless provision was made in the will for the instant devolution of the testator's rights and duties on the heirs or coheirs, the testament lost all its effect. The family was a corporation, and the heir succeeded to the testator as its public officer, being the successor "uno ictu" to the "universitas juris," which differed from other bundles of rights and duties, in having once belonged to one and the same person.

The Roman "testamentum per æs et libram" was an ordinary mancipation, an out-and-out conveyance, unconditional, irrevocable and of immediate effect ; and the instrument declaratory of the bequests bore the same relation to a testament as the deed leading the uses bore to the fines and recoveries of old English law; or as the charter of feoffment bore to the feoffment itself. With the testament "septem signis signatis," sealing first appears, though it was known to the Hebrews. By the Roman will is generally meant that made in accordance with the Jus Tripartitum. The Romans, in their horror of intestacy were very different from the French, who prefer being saved the trouble of making a will ; and this horror is explained by their

[1] "Early Law and Custom," chap. iii.

considering the will as a means of making good provisions for their families ; for the power of diverting property from the family is not older than the latter portion of the Middle Ages, when feudalism had completely consolidated itself. When movables became completely disposable by will, claims of children became obliterated, though the widow's were still respected, the change being attributable to primogeniture. Testaments became the principal means of producing inequality ; and there could be no broader distinction than that between free testamentary disposition and a system like feudalism.[1]

[1] "Ancient Law," chaps. vi., vii.

PART X

EARLY HISTORY OF THE PROPERTY OF MARRIED WOMEN [1]

THE first stage in the history of Married Women's Property is when the wife enters "in manum" of her husband; the next is marked by the contrivance of the annual absence for three nights and days; and the "manus" (which originally denoted not only the marital, but the whole power of the paterfamilias), being thus evaded, the conditions of the wife's property, owing to her guardian's power being nominal, resembled that of a married woman under a modern marriage settlement. Then comes the "dos," a contribution by the wife or another on her behalf to support the expenses of the conjugal household, to provide which the Leges Julian et Papia Poppæa obliged parents; and from this compulsory dotation is derived the "doarium," by which a third of the rents and profits of a deceased husband went to his widow. The "corpus" was only capable of alienation with the consent of the court. Minus the dos, the wife's property, her "parapherna," distinct from the present "paraphernalia," was under her exclusive control and disposal.

[1] "Early History," lect. xi.

If the Hindu "stridhan"—according to Manu, it consisted not only of what the father, mother, husband, or brother gave at the time of the wedding up to the nuptial fire, but also included everything she acquired by inheritance, purchase, partition, seizure, or finding—originated in the Bride Price, part of which was paid to the wife and part to her family, it consisted of, firstly, property conveyed to the wife at the nuptial fire; secondly, of what corresponded to the Roman "dos," from her own family; and, lastly, of all her property whatsoever. In the special succession to the stridhan, female relatives were preferred. It is untrue that men have tyrannised over the weaker sex; and the cause of the Brahmans' reluctance in placing property in women's hands, was the same as that which influenced them to assign individual rights—"capita" as opposed to "stirpes"—viz., religion; and this also, together with the anxiety of the family, was the ultimate cause of the "Suttee," an institution contrary to the general law of the Hindus, which latter gave a life-interest to a childless wife in preference to collaterals.

The differences in the histories of the Romans and Hindus are accounted for by the fact that the one did, and the other did not, favour and increase those changes, which put an end to the seclusion and degradation of women.[1]

[1] "Early History," lect. xi.

PART XI

THE BREHON LAW[1]

THE first volume of the Irish law, the so-called Brehon Laws, was published in 1865 ; but than the professed Irish Code there is probably an older nucleus, corresponding to the Twelve Tables, for juridical interpretation. The Brehon law, having grown, unlike Teutonic and Roman laws, before the era of legislatures, is not obscured by any legislation of centralised powers ; and, containing strong analogies to Hindu law, it is an authentic monument of ancient Aryan usages. The law exists in the form of tracts, the two largest being the "Senchus Mor," and the "Senchus Aicill." The former is attributed to the fifteenth century, though it professes to have been written under St. Patrick, which is not impossible, as usages had been set down in writing very soon after the conversion to Christianity. The Senchus Aicill is referred to the fourteenth century. Most of the Senchus Mor is in verse. Each tract consists of an original text with glosses and commentaries, and was probably the property of a "Family Law School." The institutions contained in

[1] "Early History of Institutions," lects. i., ii., iii., iv., v., vi., vii., viii., x. ; "Early Law and Custom," chap. vi.

them are identical with those of early English law; but Spencer and Davis and the Statute of Kildare, 1367, have condemned them. The preface claims a semi-divine origin for the Senchus Mor. The statement that pecuniary fines originated in Christian influences is unacceptable: they probably succeeded simple retaliation.[1]

The Brehons were an hereditary class of professional lawyers, resembled a caste, and were the creators of the Irish law. Strong points of correspondence existed between the functions of the Druids and those of the Brehons, though the latter disclaimed any connection with the former; *e.g.*, their authority as judges and referees in cases of homicides, boundary disputes, &c.; their teaching in schools, the Irish course covering twelve years; their issuing law, and that in a poetic form; their discussions of philosophical matters, and astronomical observations; and the election and appointment of a chief of the order. The judicial power once belonging to a popular assembly was delegated to the Brehons, the most ancient of whom were of royal blood; and Brehon families became the hereditary lawgivers of princely houses. They were not priests —in this they differed from the Druids—which fact accounts for the absence of supernatural penalties in Brehon law. Their self-assertion—*e.g.*, in classing themselves with bishops and kings, and their claiming that St. Patrick sanctioned their law—were the causes of the existence and authority of the Brehon codes.[2]

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[1] *Et sup.*, "Early History," lect. i. [2] *Et sup.*, *Ibid.*, lect. ii.

They bore a strong resemblance to the Brahmans[1] of India. The "Senchus Mor"[2] they maintained to be formed on the law of nature — the ancient pre-Christian ingredient—and the law of the "Letter"; provided the former did not clash with the latter. It is objectionable to designate, as Dr. Sullivan does, part of the Irish legal system as Statute Law; for in ancient time the legislator, like the judge, was only understood to declare pre-existing law or custom. In his division of the Continental Celts into Equites, Druids, and Plebeians, Cæsar overlooked the fact that the Equites or chiefs stood in closer relations to their various septs or groups than they did to one another; and that the Plebeians were distributed into every sort of natural group. The tribal chief or king standing by the side of the popular assemblies was the chief priest as well as Captain of the Host; but among the Gauls and Celts of Ireland he ceases to be a priest; and the popular assembly acquire his judicial powers, only in the end to surrender them to the Brehons.

The Law of Distress is the chief subject of Brehon law. The lack of sanctions distinguished it; and consent to arbitration was made compulsory by seizure of property. To enforce a legal rule, according to the Senchus Mor, it was necessary to fast on the person;[3] but the principle could hardly be asserted after Christianity, ordaining fasting, had been adopted. Without

[1] "Early Law and Custom," chap. vi.

[2] *Et seq.*, "Early History," lect. ii., &c.

[3] Sitting "dharna."

the authority of the Hindu jurisprudence, the Brehon Code more resembles the Responsa Prudentum, but was not, however, like the latter, enforced by Courts of Justice; and, composed of the opinions of an hereditary caste, who invented facts on which to frame decisions, it widely differed from the English law, the great glory of which arises from its view of "facts," always, unfortunately, the despair of the law-reformer. For the "will," Brehon jurisprudence is indebted to Roman law; whilst the "Corus Bescna"—a treatise on the archaic limitations of family rights—a subtract, shows that for "contracts" it is indebted to the Church. As a general rule, Christianity has a negative influence; but there resulted from its adoption the addition of a large mass of rules relating to the territorial rights of the Church; though the Law of Marriage shows that the new religion had not completely interpenetrated the law of the Brehons. The primitive notion of kinship is stamped in the Brehon law more clearly than in the actual land law of India; and the rights of a brotherhood of kinsmen control the rights of private owners; and the chief of the clan is on the way to acquiring the position held by a lord of the manor; and the reason why the feudal monarchy was the exact counterpart of the feudal manor is that both were in origin bodies of assumed kinsmen settled on land, and the fact that they went through the same transmutation of ideas. The term "family" or "fine" is applied to all the subdivisions of Irish society, even to the tribe itself; but more properly to the "sept," the legal unit of the Brehon tracts. The eponymous ancestor gave

the name not only to the chief, but also to the country.

The Irish tribe constituted a corporate, organic, self-sustaining, political unit; and, with a king at its head, was settled on the tribal territory, part of which descended from chief to chief. That part of the land occupied by the fuidhirs became permanently so occupied either through the tacit sufferance or active consent of the tribesmen. Prior to the introduction of English law, Tanistry or Gavelkind were the modes in which land descended. In the case of Gavelkind there was a redistribution of all the land of the sept on the death of a landowner. The Hindu "stirpes" were actual divisions of the family living together in distinct parts of the common dwelling. The "Rundale" holdings in Ireland—definite areas occupied by a group of families—point to collective enjoyment, and the modes of occupancy being liable to be changed by the legal proprietor, the occupiers were really lessees, or tenants at will. The Corus Bescna, probably influenced by the Church, is in favour, however, of separate ownership.

The Fine, mentioned in the Corus Bescna as the tribe, is not the tribe but the sept, and corresponds to the Joint Undivided Family of the Agnatic kindred. The tract, "Judgments of Co-tenancy," says that co-tenancy arose owing to the increase of several heirs on the land. Each kinsman tills as he pleases; then exchanges are made, and after boundaries have been fixed, in the tenth year separate property is attained. The "Liber Hymnorum" mentions the great increase

of population as the cause of the fixing of boundaries.

Wherever the joint family is an institution of the Aryan race we find it springing from a patriarchal cell, and when it dissolves it dissolves into a number of those cells. The chief is chosen from the eldest line, and is elective ; so the more the patriarch approaches the condition of a chief, the more "elective" does his office become. Aristocracy and kingship, having at first the same history, begins with chieftaincy. It is only when it is composed of victors, that an aristocracy can be termed a section of any community. The chief rules his own land ; is the most noble, experienced and wealthy in live stock, and is steadfast in suing for profits and being sued for losses. Riches constitute the principal condition of chieftaincy. The first aristocracy that sprung from kingly favour was probably the "comitatus" ; and the companies expected the rewards of land which they obtained, for land was the cheapest commodity of the Middle Ages. They also expected part of the spoil, which, when possessed in a great quantity, led to nobility. But the retinue of the King of Erin was composed of men of servile condition ; the free tribesmen also were numbered among the body-guard.

Every signory or chiefry went, with a portion of the land, to the tanist, not by descent, but by election, or force. By the Irish custom of Gavelkind, inferior tenancies were partitioned among all males of the sept, including bastards, and when one of them died there was repartition. And this also occurred in the Hindu

joint family. In proportion as the belief or fact of kindred diminishes, the more do the households cling to the allotment each has obtained, and redivisions become less frequent, till we at last arrive at English Gavelkind. There co-existed in Ireland Gavelkind as it exists in Kent. Old chiefs, in the decay of their vigour, parted with their power, and only retained a fraction of their property. On their deaths the eldest and worthiest in blood, as a brother, succeeded as tanists. Where there is internal peace and kingly authority, respect for purity of blood has full play, and even an infant can succeed as ruler. There was doubt as to which had the better right in the time of Henry II.; but when the eldest son had once taken the place of his uncle as heir to his father, he probably acquired the portion of land attached to the chiefry which went without partition to the tanist.

Within the Irish family seventeen members were organised in four divisions; the Geilfine, a junior class of five persons; the Deilhfine, the "true"; the Jarfine, the "after"; and the Judfine, the "end." When any one was born into the Geilfine, the eldest members of each was promoted into the higher division. The "fifth" person in the Geilfine was termed "parent" and "Geilfine Chief." This is not, therefore, a classification founded on degrees of consanguinity, as we understand them. Morgan concludes that ideas concerning relationship fall either under the descriptive system—this is our own, and classes relatives either from "ego," or a common ancestor—or the classificatory system, in which relatives are grouped in classes having

no necessary connection with degrees, which is founded on a state of sexual relations. The reason why the number five is the representative number, is that there are five fingers on the human hand, the sign of power. In the Geilfine the parent had the four natural or adopted sons immediately in his power; the first in dignity was the younger son.

In Brehon law the same word "guild"—many guilds have grown out of primitive brotherhoods of co villagers and kinsmen—describes bodies formed by contract of co-partners, and bodies formed by common descent of co-heirs or co-parceners; and present guilds, though artificial, confirm this assertion.

In Ireland the relation existing between religious houses was tribal; and the original monastery founded by a missionary, who perhaps was a chief, was deemed the parent of those which had derived their existence from it; all belonging to the same family and akin to each other. In the succession to abbacies, blood relationship was preferred to election. Spiritual ties affected marriage, and in Ireland were closely assimilated to blood relationship; but not, however, to such an extent as literary fosterage, creating the "patria-potestas" in India, where preceptor and disciple succeeded, in default of kinsmen, to each other, and where aptitude was considered hereditary, which led to the forming of a literary caste.[1]

[1] *Et sup.*, "Early History of Institutions," chaps. i.–viii. (inclusive); "Early Law and Custom," chap. vi.

PART XII

CONTRACTS

When persons trained in political economy apply it as an art they endeavour to enlarge the province of contract.[1] In the ancient Roman law, theft was the only form of dishonesty treated of. In Homer the deceitful cunning of Ulysses was praised as well as Nestor's prudence and the constancy of Hector. Montesquieu's Troglodytes, who systematically violated their contracts, perished utterly. The fact is that they flourished without paying much respect to contract. The good faith, Rousseau points out, of the Persians ceased with civilisation. His theory of the "social compact," which derived its sap from speculations of lawyers, was first valued by Englishmen as being of service in politics; and the English authors of the theory saw that it was applicable to all social as well as political phenomena, and was especially useful as a means of eluding such doctrines as that of divine right; and Dr. Whewell considers the doctrine of an original contract a convenient form for the expression of moral truths. Originally, contracts were incomplete conveyances: (1) formal exchange and sale, (2) sale in which

[1] *Et seq.*, "Ancient Law," chap. ix.

purchase-money remains unpaid, and (3) lastly where no delivery, nor payment, are epochs in the development of contracts. The first name for contract, for which there was no room in ancient societies, except as between heads of families, was "nexum," the definition of which, "omne quod geritur per æs et libram," confounded the former with conveyance. Precisely the same forms were used for both; and in ancient contracts forms are the most important. The mental engagement signified through external facts the Romans termed Pacts, or conventions; and of these "contracts" were merely a species. If the proposition "in primitive society property is nothing, obligation is everything" were reversed, it would be nearer the truth. Among the Romans the "contract" was a "pact" plus an obligation; and the "obligatio" was only undone by "solutio." Each class of contracts was named from what was necessary besides the consensus to create the "vinculum." The question and answer of the "stipulatio," the ancient verbal contract, was the "nexum" in a simplified form. With regard to the primitive "literal" contract, it is not certain whether the obligation was created by a simple entry on the part of the creditor, or whether the consent of the debtor or corresponding entry on his own books was necessary to give it legal effect. The third class of contracts in historical order, the first derivation from the nexum being the contracts "verbis," the second those "litteris," consisted of "real" contracts. Whenever an agreement had for its object the delivery of a specific thing, as soon as the delivery had actually taken place, the

obligation was drawn down ; though formerly, unless a person, lending money, had stipulated formally for it, he could not sue ; but in the real contracts performance on one side imposes a legal duty on the other, and moral considerations appear as an ingredient in contract law. "Consensual" form the last class, and the term "consensual" indicates that the obligation is at once annexed to the "consensus," and is analogous to "real," "verbal," and "literal." What were termed "natural" obligations practically differed from obligations merely null and void in that they could be civilly confirmed if capacity to contract were subsequently acquired. Since the notion of a "vinculum juris," as well as the theory of "natural law," are exclusively Roman, the mature Roman law of contract and debt are also so. The adjunct "quasi" in such expressions as "quasi-contract" is exclusively a term of classification ; and so-called "quasi-contracts" are not "contracts" at all ; and it is the law in consulting the interests of morality that imposes an obligation. The Roman jurisprudence of contract performed for the relation of sovereign and subject the same service which it rendered to the relation of persons bound together by an obligation of quasi-contract.[1]

It is probable that the Romans styled the consensual contracts, contracts "juris gentium," owing to their having perceived the universality of such contracts becoming binding through mere assent; but they existed before the formation of the "juris gentium," wherefore they could not originally have been termed "juris gentium."

[1] "Ancient Law," chap. ix.

PART XIII

COGNATION AND AGNATION

COGNATIC relationship arises through common descent from a pair of married persons. Agnatic relationship is the connection existing between members of the same family, being founded not on marriage but on the authority of the paterfamilias ; and all persons who are Agnates are under the same paternal power. A table of Cognates is formed by taking each lineal ancestor in turn, and including all descendants of each of both sexes : if we stop at the name of a female and pursue that branch no further, all who remain, including those who are adopted after the descendants of women are excluded, are agnates, and the relationship existing between them is agnation. The reason why descendants of females are outside the limits of archaic kinship is that where potestas ends, kinship ends, relationship being exactly dependent upon the patria-potestas ; and the exclusion of women from political functions, attributed to usages of the Salian law of the Franks, has an agnatic origin ; and the exclusion from succession to each other's land of half-blood is derived from the fact that agnatic uterine brothers are no relations at all ; and the English judges extended the resulting incapacity to consanguineous brothers also. The family,

as held together by the patria-potestas is the nidus out of which the Law of Persons has germinated. The contrivance by which women included in the agnatic relationship were retained in the bondage of the family for life was the "perpetual tutelage of women."[1] The Romans regarded "Gentile" relationship as kinship similar to agnation; and the "Gens" was composed of a group of descendants of ancestors long since forgotten; though imitation caused some amount of fiction.[2] Morgan considers that first groups acknowledge female descent. A similar institution exists in Australia and is marked by the "totem."

When the three ancient modes of marriage fell into disuse it became confined to certain classes; the rights of the wife's original family remained unimpaired, she no longer passing "in manum viri"; and she remained in the perpetual tutelage of her guardians, whose authority (ultimately reduced to a shadow)[3] overrode in many respects that of her husband. There resulted a remarkable liberty of divorce, which was, however, narrowed by Christianity;[4] but that liberty was the cause, together with religion, of the transition from polygamy to monogamy; but Christianity did not interpenetrate the Law of Marriage in Ireland, where women, in certain conditions are more favoured than they are in other systems of law.[5]

The theory that there is one ancestor of all the tribes-

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[1] *Et sup.*, "Ancient Law," chap. v.

[2] *Et seq.*, "Early Law and Custom," Notes and Illustrations.

[3] "Early History," lect. xi.

[4] "Ancient Law," chap. v. [5] "Early History," lect. ii.

men could not have existed prior to the institution of marriage.[1] The force that was originally employed in obtaining a wife by the husband is still simulated in some marriage ceremonies.[2] During the troubled era that begins modern history German and Sclavonian laws remained superposed over Roman law ; and the husband, taking a wife from any family except his own, paid a price for her,[3] which Bride-Price existed in the Hindu law and was the supposed origin of the Stridhan ;[4] but in time the husband ceased to purchase his wife when unmarried females had been relieved from family bondage ;[5] and from this time the law of Southern and Western Europe began to be distinguished by the freedom allowed unmarried women and widows. The Code of Justinian relating to marriage was read not in the light of Roman, but of Canon law, which latter became prevalent everywhere. The Code Napoleon followed those local codes of some parts of France which allowed married women of a rank below nobility nearly all the powers given by Roman jurisprudence. The state of Scotch law shows that scrupulous deference to the latter did not extend to the mitigation of the disabilities of women ; and the Danish and Swedish laws were less favourable to wives than the generality of Continental codes. The English Common law is yet more stringent in the proprietary incapacities it imposes, being mostly borrowed from the Canon law ;

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[1] "Early History," lect. iii. [2] *Ibid.*, lect. ix.
[3] "Ancient Law," chap. v. [4] "Early History," lect. xi.
[5] *Et seq.*, "Ancient Law," chap. v.

and the complete subjection of wives remained untouched by equity or statute law.

In ancient times the father had absolute power, extending to life and death over his children.[1] In Hindu and Irish society the relation of teacher and pupil closely resembled that existing between father and son.[2] Adoption was one of the earliest legal fictions, and arose from the process by which the family became expanded into the tribal community; for strangers were, through necessity, admitted into the original family, and it was expedient that they should feign themselves related: in sharing in the sacrifices, they shared in the common lineage.[3] A great cause of adoption was the strong desire to have male offspring to perform the funeral ceremonies, and to worship the adoptive ancestor.[4] In the Irish law the adoption of a son had the same effect as the birth.[5]

On the death of his father a son was released from paternal power because he was capable of becoming the head of a new family;[6] if he were an infant, his subjection to it was prolonged in the hands of another, his guardian till he arrived at puberty, and became able to found a new family, when he at once became independent: and this is the origin of "tutela." Women were placed under perpetual guardianship

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[1] "Ancient Law," chap. v. [2] "Early History," sect. viii.

[3] "Ancient Law," chap. v.

[4] "Early Law and Custom," chap. iii., and "Ancient Law," chap. vi.

[5] "Early History," sect. vii.

[6] *Et seq.*, "Ancient Law," chap. v.

because they were incapable of having persons under their "power"; for on the death of the paterfamilias, though they were on that account theoretically released from the patria-potestas, it virtually continued in the hands of the guardian, and perpetual guardianship was nothing else than an artificial prolongation of the patria-potestas. The original tutela, therefore, was a different thing from the modern idea of guardianship, which first arose in the creation of "curators" under the Lex Plætoria.

The Greeks explained slavery as grounded on the intellectual inferiority of certain races; the Romans on a supposed agreement between victor and vanquished: the wish to use the labours of another for the production of one's own pleasure and ease, is the true foundation. The tie uniting a slave to his master was the same as that binding any other member of the family to the chief; and that a slave was not completely outside the pale of the family, nor degraded to the footing of inanimate property, is proved by the fact that in the last resort he was capable of inheriting the property of his master.

PART XIV

DELICTS AND CRIMES

OFFENCES against the state are called crimes, "crimina"; against individuals, wrongs.[1] In the infancy of jurisprudence, citizens depended for protection against violence or fraud not on the law of crime, but on the law of tort. The law of the Senate of Areopagus was a special religious code; the Pontifical jurisprudence punished adultery, sacrilege, and perhaps murder. In both Rome and Athens offences against God were punished as sins, and those against individuals as torts. A separate enactment of the legislatures of primitive commonwealths punished every offence vitally touching their security; and this is the earliest conception of a crime, and the law directed against the perpetrator was called a "privilegium"; and the Athenian εισαγγελια—bills of pains and penalties —survived the establishment of regular tribunals. The criminal jurisdiction of the Witenogemot was of the same nature. In disputes concerning composition for homicide, the share in the compensation awarded to the plaintiff of the state was claimed as a price for its time and trouble. The distinction between manifest

[1] *Et seq.*, "Ancient Law," chap. x.

and non-manifest theft was not confined to Roman law, and the Anglo-Saxon and German codes only allowed the thief to be killed if taken in the act or before the pursuit has been intermitted.

The history of Roman criminal jurisprudence begins with the Judicia Populi, presided over by the king, which delegated its criminal jurisdiction to Quaestionies, some of which were, it is believed, annually appointed. True criminal law came into existence with the Lex Calpurnia de Repetundis ; but in spite of the perpetual Quaestionies the Comitia still exercised its powers. The Comitia Centuriata reserved the right to inflict capital punishment, and the incompetency of other tribunals—for even the Comitia Tributa was incapacitated in this respect—gave birth to the Præscriptiones. Before the death of Augustus, Rome had obtained a complete criminal law. Gradually the punishment of crimes passed to magistrates nominated by the Emperor, and his privy council succeeded to the privileges of the senate ; and this becoming a court of criminal appeal, paved the way to the doctrine that the supreme Judge in criminal as well as in other matters is the Sovereign.[1]

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[1] *Et sup.*, " Ancient Law," chap. x.

PART XV

REMEDIAL RIGHTS AND PROCEDURE

ALL the later Roman law of actions has grown out of the "actio sacramenti" The ceremony described by Gaius is substantially the same as that in Homer which Hephaestus is moulding into the shield of Achilles.[1]

"Legis Actio"[2] is equivalent to procedure, though it partly consists of modes of executing decrees; and Lex and Legis Actio correspond to substantive and adjective law; but the former term when applied to early law is misleading. The technical formalities of the "actio sacrimenti" are a dramatisation of the origin of justice; the formal "dialogue" and the "sacramentum" are the parents of the modern "pleading" and "court fees"; and the pretended quarrel remained in other societies, and in the "Wager of Battle" it was a reality; the idea of force is still retained in the marriage ceremonies of different peoples. The true signification of the "sponsio" and "restipulatio" is that betting would avert bloodshed.

The "condictio" was not created, as Gaius says, but merely regulated by the leges silia and calpurnia.

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[1] "Ancient Law," chap. x.

[2] *Et seq.*, "Early History," lect. ix.

It was the "manus injectio" that first gave an impetus to those popular movements which ultimately affected the whole history of the Roman commonwealth; and it was the original mode of execution against the person of the debtor. The true office of the extra judicial "pignoriscapio" consisted in allowing the claimant to take forcible possession of the property of his adversary till the latter consented to submit to the court; and though it was somewhat similar to the modern power of distress and replevin, yet it was different, in that the modern idea of distress has in view compulsory credit to the tenant, and principally concerns rent.[1] The practice of distress is attested by records before the Conquest, and differed from the sacramental action, in that in the seizure, rescue, and counter-seizure the foray was a reality; and the impounding, pledge, and acknowledgment of continuing ownership point at a feeling of revenge which was necessary to be regulated. The action of replevin affords an example of the ancient principle under which the defendant was plaintiff. The Salic law only allowed distress to be resorted to when the sanction of the popular court had been obtained; and Blackstone unconsciously agrees with Gaius in saying that it was its hazardous character that caused the gradual disuse of distress, though it is also the case that the more public force is placed in the hands of tribunals, the more does extra-judicial assistance become dispensable. In ancient law, it is concluded, distraint was either incorporated with a regular procedure

[1] *Et seq.*, "Early History," lect. ix.

or considered a wilful breach of the peace, unless it were, up to a certain point, resorted to as a means merely of compelling submission to the court. A peculiarity of the Irish distress, which extended to breaches of contract and attendance of witnesses, was the presence of a Brehon law agent, though it required neither assistance nor permission from any court of justice.

In the "notice" and "stay of proceedings" it was less archaic than the English law; also in the regulations as to "witnesses" and the "legal adviser." The Irish law contained a provision not contained among Teutonic rules, but at present existing in India, viz., the "fasting" on a debtor of high rank; the Hindu "sitting dharna." In the latter the Brehon law is closely connected with Hindu law, and in the confining cattle, with the English law; though it went further than the latter in confining the wife and son as well.[1]

EVIDENCE[2]

It is probable that the cause of the existence of the English Law of Evidence is the separation of the provinces of Judge and Jury. The Indian Evidence Act (joint result of the labours of Judge Steven and the Indian Law Commission) abandons the term "hearsay," and confines the expression "evidence" to actual media of proof, "statements which the court permits or requires to be made before it by witnesses in rela-

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[1] "Early History of Institutions," lects. ix., x.

[2] "Village Communities," Indian Evidence Act.

tion to the matter of fact under inquiry," and to documents produced for the inspection of the court.

In the "Evidences of Christianity" the term evidence has the following meanings—viz., the testimony, the facts believed on such testimony, and the arguments founded on them. Courts can only be concerned with two classes of facts: (1) "facts of issue," the fact or group of facts to which, if its existence be proved, the substantive law of a given community attaches a definite legal consequence, generally an obligation or a right; (2) "relative" facts, which affect the probability of facts in issue, or have the capacity of furnishing an inference from them.[1]

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[1] "Village Communities," Essay.

PART XVI

CASE LAW

ENGLISH case law, like the "responsa prudentum," rests on legal fictions. When a group of facts comes before an English court for adjudication, it is taken for granted that there is somewhere a rule of known law covering those facts; but as soon as the judgment has been given it is admitted that the law has been modified or altered. But the generally received theory, among other inconsistent doctrines, concerning English jurisprudence, is that adjudged cases and precedents exist antecedent to rules, principles, and distinctions.

The English case law is sometimes spoken of as unwritten; but it is a question whether the whole of the law the English judges claimed to monopolise was unwritten law; at any rate, as soon as decisions were formed in recorded cases, case law at once became written law, and only differed from code law in being written in a different manner.[1]

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[1] "Ancient Law," chap. ii.

PART XVII

CODES, CODIFICATION, OFFICIAL DRAFTSMEN

LAWS written or engraved on tablets took the place of usages deposited within the recollection of a privileged oligarchy. Most codes are direct results of the invention of writing, and merely enunciate pre-existing customs. Their great value consisted besides, in making the knowledge of law available to all, in preventing those usages adopted by the state in its infancy, which are generally the most beneficial to it in later times, from degenerating by analogy. The Hindu code of Manu, the sacerdotal element in which has been underrated, does not as a whole represent a code of law ever actually administered in India; and, in point of the relative progress of Hindu jurisprudence, is a recent production. The Attic code of Solon had very little order, and the code of Draco probably less. The theoretical descent of Roman law from a code, and the ascription of English law to immemorial usage, are the causes of the differences in the development of the two systems.[1]

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[1] "Ancient Law," chap. i.; "Early Law and Custom" chap. i.

CODIFICATION [1]

Codification has acquired two meanings. The term is applied to the conversion of unwritten law into written law—*e.g.*, the twelve tables, the laws of Draco, of Solon, and the earliest Hindu codes of Manu and Narada, &c. Secondly, it is, in the present sense of the term, the conversion of written into well-written law. The great difficulty of codification arises from the fact that no code can prevent the extension of law by judicial interpretation.

OFFICIAL DRAFTSMEN IN LEGISLATION [2]

The introduction of amendments into bills is a very great evil. It could be remedied by the creation of official draftsmen ; but the latter are objectionable, as they would be likely to interfere with the liberty of Parliament.

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[1] " Village Communities." [2] *Ibid.*

PART XVIII

ROMAN LAW AND LEGAL EDUCATION

ROMAN law should be studied, not only because of its historical connection with English law, but also owing to the fact that the more matured English law becomes, the more will it resemble Roman law. In addition to the two above reasons, it should be studied for the following: Roman law pervades and modifies all products of human thought not exclusively English; the study is an excellent gymnastic for the mind; moral philosophy, on the Continent, has been discussed in the language and according to the modes of reasoning of the Roman law; the work of Grotius is founded on Roman law, and the phraseology of the latter, preferred by the followers of Grotius, is better than Bentham's or Austin's; in legislation and legal expression it would serve as a model, and would furnish concise terms; it would improve the whole vocabulary of philosophy; it is the key to private international law, and would be of great aid in the law of nations and diplomacy, in which Roman technical terms are so mixed up; it is the "lingua Franca" of European jurisprudence, and since the code of Louisiana, of America; its study would make men more capable of

grappling with codification; and, lastly, it is valuable as an exercise in the interpretation and manipulation of express written rules.[1]

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[1] "Village Communities," Essay, pp. 330–387.

PART XIX

COMPARATIVE JURISPRUDENCE

When two or more systems of law are taken and compared together, either the whole or part, *e.g.*, the law of marriage, of the one, with the whole or the same part of the other, this is comparative jurisprudence. The term is applied in a second sense to the examination of a number of phenomena with a view of establishing if possible that some of them are related in the order of historical succession, the word "comparative" signifying what it does in the phrase "comparative philology," and this method, in some of its applications, is indistinguishable from the historical method.[1]

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[1] *Et sup.*, "Village Communities," lect. i.

PART XX

CLASSIFICATION OF LAWS[1]

In all the codes, theft and deposits occupy the foremost ranks. The prominence of thefts points to a barbarous period. The codes of Manu and Narada presume quarrels and disputes; and courts of justice, as in Icelandic society, are the dominant idea. The "Senchus Mor" chiefly concerns distress and hostage securities. Manu and Narada begin with the mechanism of courts of justice, procedure, and evidence; then come heads of disputes and relations which originate disputes. The reprisals and violence allowed by early courts point to their own weakness. The transfer of the law of actions from the first to the last place proves that a habit of obeying the law had been acquired, which the law of Nature more especially does, for the latter so hid the sanction of law that Austin and Bentham had difficulty in persuading men even of its existence. Modern classifications of law are based on kinds of rights, the idea of which belongs to a modern date; but still the Roman jurists distinguished law from procedure, and their conception of a

[1] "Early Law and Custom," chap. xi.

law of things was a great achievement in mental abstraction.

The triple division into law of persons, things and actions is now exploded. The Roman jurists are unjustly blamed for the inconsistencies of this classification, for they had never clearly arrived at any conception of "right." But this was not the popular division of law with the Romans; for the orders followed in the edict, code, and digest are founded on the order of the twelve tables. In all these, as well as in the Lex Salica and the Brehon codes, and the codes of Manu and Narada, adjective law comes first; though there is an ecclesiastical preface to the code, and the digests open with definitions and principles.

PART XXI

VILLAGE COMMUNITIES

A body of kindred holding a domain in common is the simplest form of a village community. The archives of Northern India show that aliens were admitted and permanently engrafted ; and in the South there are communities which have sprung from two or more different families, and in some the composition is entirely artificial ; in all, however, common parentage is assumed. Village communities therefore are either assemblages of blood relations, or bodies of co-proprietors of land formed on the model of an association of kinsmen. A landholder of a village community of Southern India requires the consent of the village if he wish to alienate or mortgage his rights, and when a family becomes extinct, its rights revert to the community. The required consent reminds us of the consent required in cases of adoptions and wills of the "comitia curiata." The co-owners of an Indian village community have their rights distinct, and this separation is complete and permanent; which is not the case, though theoretically so, in the Russian village. But in Servia, Croatia, and Austrian Sclavonia, not only is the common property undivided, but it is considered indivisible, according to the principle "the property of

families cannot, for perpetuity, be divided." The chiefs of the ruder Highland clans, it is said, used to dole out food, at the very shortest intervals, to their subordinate heads of families, and in Sclavonian villages of Austria and Turkish provinces there is an annual distribution of the total produce of the year.[1]

Village communities are found even in the most backward Sclavonic societies; but among the Celts the real character of the institutions is hidden by feudal law; though large communities with shifting severalties have existed within living memory in the Highlands. In France the associations consist of groups of kinsmen of the house community type.[2] They have been met with also in Japan and Northern Africa.[3] Consanguinity, real blood relationship, is thus the earliest tie binding men in communities, and theoretically there is but one ancestor of all the tribesmen, whose descendants have formed themselves into sub-groups, the smallest of which is the existing family. To be true, however, this assertion must be confined to the Aryan, Semitic and Uralian races, and, according to Morgan, must be subsequent to the institution of marriage. Kinship tends to be regarded as the same thing with power, owing to the subjection to the common authority; even the tribe consists of a group of men subjected to one chieftain; and the conception of kinship is simplified by patriarchal power. The case of the Velatee, who crystalised down into village

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[1] *Et sup.*, "Ancient Law," chap. viii.

[2] "Early History," lect. i. [3] *Et seq.*, *ibid.*, lect. iii.

communities, proves that principles of union exist in a tribe before its final settlement; but after the latter, land takes the place of kinship, and becomes the basis of society; and Englishmen are those who live in England, whereas England used to be the country inhabited by Englishmen. Abrupt stages cannot be assigned to the changes of the earliest cultivating groups of kinsmen, into bodies held together merely by the land (*vide* "Origin and History of Property").[1] Most of the legal ideas[2] of civilised races may be traced to the conception of the patriarchal group, the source of a great part of law; and of the village community it is the family that is the unit.

The Teutonic,[3] cultivating community, consisted of a number of families standing in a proprietary relationship to land; and the latter was divided into three portions: the mark of the township or village, the arable mark, and the common mark or waste. The arable mark was allotted to the several families, each governed by its own paterfamilias, whose house's privacy was considered sacred. The common mark was owned strictly in common, and has survived in England as "common," "commonable," "open fields," and intermixed lands; the arable mark is also found, and, as in all Teutonic village communities, is invariably divided into three long strips (for a rude rotation of crops), which were again subdivided, there being most intricate regulations for the cultivation by each householder of

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[1] *Ante*, p. 31.

[2] "Village Communities," lect. i.

[3] *Ibid.*, lect. iii.

his lot—the first form of the law of landed property. Whereas the "meadow" was frequently redivided, the periodical distributions of arable land were rare. The arable part of the domain was indicated by (1) simple intermixed fields of nearly equal size, and belonging to a great number of owners; (2) by "shifting severalties," which were rare; (3) by fields of nearly equal size, arranged in three long strips; (4) by certain rights of pasture over the green baulks. The portion of the domain kept in grass was represented by (1) shifting severalties of meadow land; (2) the removal of enclosures after hay harvest; (3) and the exercise, when hay was not maturing for harvest, of the right to pasture.

In the Indian village community[1]—identical, except in some details, with the Teutonic and Sclavonian—although there is private property in the arable land, there is no departure from the joint system of cultivation. The elders, who are either elected or hereditary, determine the distribution of water; but it is custom that the villagers consider should be obeyed, the great sources of early law being either authority, custom, or chance; and the second, it is accepted in India, can be created by the first. The extraordinary secrecy of the family life is the characteristic of the Indian homestead; and any attempt by the lawgiver to intrude on the paterfamilias' judicial power would be looked on with the greatest disgust. In India, nearly all movable property followed the king; and the camps of the latter,

[1] *Et seq., ibid.*, lect. iv.

though many towns have grown from the collection together of village community townships, are the origin of the most famous cities. The waste lands in India are considered the property of the various communities, who are only waiting an opportunity to cultivate them. The communities themselves are organised and self-acting ; with a village police, accountant, and several hereditary traders ; and an elected headman or a village council exercises their deputed authority. The different trades have separate lots assigned to their members ; but those traders who bring goods from distant markets are not included in the organic group.[1]

[1] *Et sup.*, "Ancient Law," chap. viii.; "Early History," lects. ., iii.; "Village Communities," lects. i., ii., iii., iv.

PART XXII

FORMS OF GOVERNMENT

AUSTIN admits the possible existence of anarchy, and so does Hobbes; and Justice Stephen insists on the possibility of a "dormant anarchy," as where there is deliberate abstinence from fighting out a question known to be undecided.[1]

Heroic kingships[2] partly depended upon divine prerogative, partly upon supernatural strength, courage, or wisdom. The royal power gradually decayed, giving way to aristocracies, and in Europe to oligarchies, the king becoming merely an hereditary general, as the αρχων at Athens, and the "rex sacrificulus" at Rome. In Greece, Italy, and Asia Minor there existed "political aristocracies," consisting of families related by blood. In Persia and India, military and religious oligarchies existed; and the latter, attached to the king, formed the governing bodies, and were the depositaries and administrators of the unwritten and customary law.

In India, according to the law books, the king sits on the throne of justice; he protects his people, and

[1] "Early History," lect. xiii.

[2] *Et seq.*, "Ancient Law," chap. i., and *vide*, p. 58, *ante*.

keeps distinct and in order the four supposed castes.[1] Though divine, he can only act with the aid of his Brahman assessors. The Brahmans in Ireland, under the Brehon law, were represented by the Brehons, who claimed for themselves divine origin.

DEMOCRACY

Of all forms of government, Democracy is the most difficult, and the greatest sagacity is required to keep it from misfortune, for its infirmities are irremediable.[2] The truth, perceived by Hobbes, that political liberty is political power cut into fragments, and by Stephen, J., that where there is political liberty there is no equality, explains the infirmity of popular governments; and Mr. Labouchere cannot be contradicted when he says that agricultural labourers will employ their power for their own interests. Though the American Constitution has lasted so well, there is no evidence that popular governments will be of indefinite duration; and "the British Constitution may find its last affinities in silence and the cold."

To suppose that democracies are more active than other forms of government in legislation is erroneous; and, like monarchies, they are at first highly destructive, though, unlike them, they trample out all privileges. An inevitable evil resulting from this form of government is the flattery of the Demos, which is always resorted to. The truths of Bentham are only visible to

[1] *Et seq.*, "Early Law and Custom," chap. vi.

[2] *Et seq.*, "Popular Government," Essays i., ii., iii., v., preface.

the intellectual aristocracy, for, as Machiavelli says, "The world is made up of the vulgar;" and, ignoring this fact, Bentham, overrating human nature and intelligence, falsely avers that democracies are much more free than monarchies and aristocracies from "sinister" influences, on the ground that whatever interests they promote must be the interests of all. This freedom he should have extended to monarchies; for the United States show that the same infirmities belong to democracies as to monarchies in that respect. At any rate, the advantages of democracy insisted upon by Bentham, if existent, are overbalanced by its difficulties; for how can a multitude exercise volition? In answering this question, the theory that it is capable of volition is confused with the theory that it is capable of adopting an opinion. A jury, the old adjudicating democracy, blindly follows the opinion of an advocate, or the summing-up of the judge. The antidote of this fundamental infirmity of democracies is representation. A neutralising drug is discovered in the caucus. The next evil is that no representative assemblies can be free from obstruction. The plebiscite is a failure, for the people cannot possibly know even the immediate results of their decision. That democracy is a progressive form of government is a gross delusion, and it cannot be denied that all scientific legislation is endangered by it; and the mitigating influences, if not to the intelligence, are certainly injurious to the morality of the multitude.[1]

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[1] *Et sup.*, "Popular Government," Essays i., ii., iii.

CONSTITUTION OF THE UNITED STATES[1]

That the American Constitution is distinctly English is proved by the fact of two Houses having been taken as the normal structure instead of one, and unless it were known that its founders had lived under a once autocratic king, it would be unintelligible; it is a version of the British Constitution as it must have appeared to our forefathers in the second half of the last century. The institution of the supreme court would have been impossible before the appearance of the "esprit des Lois," and Montesquieu's standard was the British Constitution. The House of Representatives sharing with the Senate legislative powers is a reproduction of the House of Commons; and the "revenue bills" in it have an English origin. The circumstances excluding an hereditary king and an hereditary nobility were the causes of the existing modifications. The success of the American Constitution is remarkable, considering that the Republican is, of all forms of government, the most dangerous and likely to be unsuccessful. The safeguards of the United States Constitution consist in the carefully defined nature of the public powers; the limited power of legislating only within the limits permitted by the Federal Constitution, conferred on individual states; the interrogation of ministers, and "procedure." The Federation is slowly gaining at the expense of the States. The impossibility of having an hereditary king is the cause of the form of the United States Constitution.

[1] "Popular Government," Essay iii.

PART XXIII

THEORIES AS TO THE ORIGIN OF LAW[1]

LOCKE'S theory that law originated in a social compact scarcely conceals its Roman derivation. Hobbes' theory repudiates the reality of a law of Nature as conceived by the Romans and their disciples. Montesquieu betrays an evident anxiety to thrust into prominence those manners and institutions which surprise the civilised reader by their uncouthness. The inference he continually suggests is that laws are the creatures of climate, local situation, accident, or imposture. The supposition that man's nature is entirely plastic constitutes the error vitiating his system; he underrates the stability of the human race and pays little or no regard to its inherited qualities. Of men's physical and moral constitution, the stable fact is the greater, and the amount and character of the variations of human society are not so extensive as to be unascertainable. The historical theory of Bentham is quite distinct from an analysis of law which is conceived in his fragment on government, and completed by Austin. In answer to the question why nations impose commands on themselves, the suggestion of Bentham that societies

[1] "Ancient Law," chap. v.

modify their laws according to the modification of their views concerning general expediency is valueless when we consider that what seems expedient to a society altering a rule of law is the same as the object in view when it makes the change.[1]

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[1] "Ancient Law," chap. v.

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